No. 10237

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE TEXAS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Transcript of Record
In Five Volumes
VOLUME V
Pages 1725 to 1799

Upon Petition to Review and Enforce an Order of the National Labor Relations Board

FILED
DEC 10 1942
PAUL P. O'BRIEN,
CLERK

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9518

THE TEXAS COMPANY

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

NATIONAL MARITIME UNION OF AMERICA,

Intervener.

Upon Petition to Review, and Request for Enforcement of, Order of the National Labor Relations Board

OPINIONS

Before: Denman, Mathews and Stephens, Circuit Judges.

Denman, Circuit Judge:

Petitioner, owning and operating a fleet of ocean going gasoline and oil tankers, admittedly engaged in interstate and foreign commerce, petitions to have set aside an order of the National Labor Relations Board (a) ordering petitioner to cease and desist from the unfair labor practice of discouraging the organization of its crew employees from collective bargaining; (b) ordering the payment of back pay to one seaman and the reinstatement

with back pay of another, found by the Board to have been discharged because of their activities as representatives of the crew in attempted collective bargaining with their captains; and (c) ordering the posting of cease and desist notices on all its vessels. The Board cross-petitions for a decree enforcing its order.

Concerning the discharge of the two seamen, we consider the proceeding before the Board as conducted with a complete disregard of the body of Congressional safety legislation for the manning, navigation and management of vessels created to protect the lives of the members of the crew. The particular statutes here applicable are later considered, but the titles for the contained enactments for the last 75 years regulating officers and seamen of merchant vessels proclaim the primary purpose of Congress to be the "better security of life on board vessels, etc.," "the better protection of life," "to promote safety at sea," "the further protection of seamen" and " for the protection of such seamen."[1]

The Board here seeks to have us hold that the captain of the ocean going steamer "Nevada" should have retained on his ship as boatswain, the general superintendent over the crew (under the licensed officers), one Buckless, a habitual drunkard, who had been elected one of the "Nevada's"

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[1]Successively these titles are in 16 Stats. 440; 35 Stats. 55; 38 Stats. 1164; 17 Stats. 262, and 30 Stats. 757.

labor leaders. The Board would have us hold this, although the Board itself holds in the same proceeding that Buckless' habitual drunkenness warranted his discharge from the steamer "Washington" less than two months after his discharge from the "Nevada."

The testimony of the "Nevada's" officers of Buckless' drunken habits was uncontradicted and the Board finds that "the evidence does not entirely support" Buckless' denial that his drunkenness interfered with the performance of his duties in superintending the sailors. Instead of giving the officers' testimony the consideration required by the principals stated in Penninsula and Occidental S. S. Co. v. N. L. R. B., 98 F. (2d) 411, 414, cert. den. 305 U. S. 653, apparently no consideration was had of the concept that a ship's captain should eliminate a habitually drunken seaman before his conduct could endanger all on board.

The duties and obligations of the master of the ship in making up and controlling his crew cannot be determined by the study of the management of, say, a great automobile factory. An automobile factory is not a moving mass of steel floating in the ocean, whose propulsion must be controlled by instant intelligent cooperation of commander and his seamen and engineers while driven through a storm or the obscuration of rain, fog or smoke in heavily traveled shipping lanes or in approaching and passing through narrow channels with cross tidal and river currents, or, as for four years from

1914 to 1918 in the Great War, in the zigzag maneuvers of a convoy, or, steaming alone, in avoiding a submarine or dodging a torpedo,—the latter situations not beyond the reasonable contemplation of the Board at the time of the writing of its briefs and of its argument.

Nor is the psychology of the workers in a mill, living in their comfortable homes with their families and with diversions of modern town life, the gauge for the seaman's mind, living in necessarily cramped quarters, though vastly improved now through the pressure of their labor organizations, having 16 hours unoccupied time between watches, without the recreations and diversions which come to men living ashore.

In the life of factory workers are no such dangers as require a maximum of ten years penal servitude for one who by force, fraud or intimidation resists or prevents the master in the free and lawful exercise of his authority,[2] nor is there need for a maximum two year sentence for assaulting a mill superintendent as there is for assaulting a ship's officer,[3] nor for giving a mill superintendent authority to place his employees in irons on bread and water, with full rations only on every fifth day, for continued wilful disobedience of lawful commands or neglect of duty at sea.[4] The mill manager fires such employees outside the yard gates. The master must

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[2]Criminal Code, § 293; 18 USCA 484.
[3]46 USCA 701, 6.
[4]46 USCA 701, 5.

have the power to compel the services of such men for the safety of all on board. This distinction between the two employments is the basis of the holding of the Fourth Circuit in Rees v. United States, 95 F. (2d) 784, 792.

In our opinion the Board has erred in failing to recognize that these maritime safety laws are paramount to the National Labor Relations Act wherever the Board's proposed orders may increase the danger which the long established safety legislation of Congress seeks to prevent or lessen.[5]

It needs but an extreme illustration to make clear our views of the supremacy of the maritime safety laws to those not familiar (as the Board here appears) with the universal hazards of navigation, and particularly in this case, in the management, in port and at sea, of vessels carrying highly explosive and inflammable cargoes of gasoline and oil. Unlike general cargo vessels, the tanker is subject to the dangers of her peculiar cargo in port as well as at sea. In some respects that menace is heightened in loading and discharging.

Take, for such illustration, the situation of any steamer just leaving dock, at dusk and in hazy weather, to traverse a harbor crowded with moving vessels. There the highest vigilance is required of the lookouts in the bow to warn of the presence and

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[5]Dangerous enterprises on land have similar protective legislation involving appraisal of their relationship to the National Labor Relations Act. The highly specalized economic and social life on a ship at sea warrants the consideration here extended.

movements of other vessels, the smartest and most concentrated attention of the helmsman to orders for immediate change of course and of the sailor or officer telegraphing the orders to the engine room for a change of speed or a reverse. If at that moment the two elected representatives of the vessel's labor organization should make a vigorous and disturbing appeal to the lookout, helmsman and man at the engine room telegraph to demand the righting of some claimed wrong in the treatment of the crew, it is apparent that because the two men are labor organizers there is the greater reason for their discharge the moment the safety of the vessel permits. Their organizing power and the prestige of their representative position make their appeal for the righting of grievances, at such a time, the greater menace to the lives of the crew they represent.

If a seaman without the power and prestige of such union authority were to start such a discussion at such a time he probably would be told in seamen's vernacular to "get the hell out of here" and no harm be done. Quite likely in the discipline of the ship, her captain would give such an intruder no more than a vigorous tongue lashing. However, the captain properly would be deprived of his license by the Inspectors in the course of the Congressionally created proceedings[6] following a collision and a sinking and drowning of some of the sailors caused

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[6]46 USCA 239, as amended 41 Stats. 1381, considered infra.

by such distracting interference of the labor leaders, if he failed to discharge them and log them as discharged, because of the abuse of their power as such leaders. And this, although the abused power is one the proper exercise of which is protected by the National Labor Relations Act.

It may be said that the above is an occurrence too remote in likelihood to be of illustrative value. To be sure, sober-minded men so would not risk their own lives and those of their mates. But is such a situation unlikely with a labor agitator who is a habitual drunkard and who is shown, by uncontradicted testimony, repeatedly to have boarded his vessel in various intensities of intoxication? In this proceeding it is of outstanding importance that the Board was dealing with a hundred percent labor crew furnished the Texas Company by a C. I. O. union, in which crew, the Board's brief admits, there was "repeated drunkenness" from the drinking which was "especially prevalent."

Indeed, from the condition which the Board found on the "Nevada", it would be over straining human self-control if some of its officers contemplating the command of the vessel in dangerous emergency, with the admitted combination of the unionization of his vessel and the drunkenness of his crew, which had elected a confirmed drunkard as their labor leader, did not sometimes think what one of them said: "Just a minute, there is one thing I want to tell you we don't allow on this ship, and that is getting drunk, missing watches, and we don't allow

any agitation with the crew on this union business."[7] The question here is whether a ship's captain is deprived of the power to make his ship safe for all the lives entrusted to his care by discharging a drunken boatswain con amore because he is a drunken labor leader.

It requires no straining of judicial notice to realize the position of the labor leaders of the crew in the closely knit social organization of the confined area of the vessel, often heated by jurisdictional contests of rival unions. The men elected to represent the crew or a part of it, can make or break the discipline necessary in the vessel's navigation and management for the safety of everyone one board. In a way they become the social arbiters of their followers. Their example is "an imponderable of the heaviest weight" as a witty Irish M. P. is reported to have put it. There is an old sea saying that "a drunken captain makes a drunken crew."

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[7]Note by Denman, C. J., individually: Lest the inference be drawn that unionization and drunkenness are necessarily connected, it may not be irrelevant for the writer of this opinion to state that he left his practice and from 1919 to 1926 had final authority in the management of a fleet of coastwise vessels operating between Pacific Coast ports. By his choice, and without agreement or negotiation, the crews were one hundred percent unionized,—that form of crew organization seeming to yield the greatest sobriety and efficiency in the fleet's operations. What the court is considering in this opinion is the Board's view of the conditions prevailing on one particular vessel.

It well may be equally true of the crew of a ship having a drunken labor leader.

It is a given quantity in a ship captain's command that a varying percentage of his crew over-indulges in intoxicating liquor.[8] It is a necessary part of his management to exercise a wise discretion in eliminating those who are not fit as lookout or at the wheel or engine room bells because of dullness of mind and nerve response when emerging from intoxication or because actually intoxicated when at station. One false shout from the bow, one failure in instant dropping anchors, one wrong turn of the wheel, or one wrong pull of the telegraph well may send the vessel crashing through the fog into another or on the rocks.

Particularly dangerous are drunkenness and the ensuing dullness in the crew of a gasoline or oil tanker. This court has had occasion to consider the menace of gases coming off oil cargoes in the case of McGill v. Michigan S. S. Co., 144 F. 788, 790, where by a fuel oil gas explosion a steamer was blown in two, with a large loss of life, while lying at dock in San Francisco harbor. The confined spaces of a tanker well may contain such dangerous gases from leakage from her oil compartments. A drunken or drink-dulled man, not realizing the oil gas fumes, may throw his lighted cigarette or match

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[8]Cf. The provision for suspending or revocation of officers' licenses for intemperate habits. Captains, 46 USCA 226; Mates, id. 228; Engineers, id. 229.

or empty his pipe ashes and send everyone to the bottom. With a gasoline cargo drunkenness is an even greater menace. Obviously the menace is further heightened by the presence in the crew of a habitual drunken labor leader, also boatswain, setting the example of intoxication to the men under him.

The exercise of the captain's discretion in the make-up of a crew to afford the safety to all in the hazards of maritime employment cannot well be appraised by the after-wisdom of judges in chambers and officials at their desks. That after-wisdom will not raise a wreck from the bottom of the sea, or resurrect the drowned or explosion-shattered members of a crew.

Congress in its statute of February 28, 1871,[9] gave to the local boards of inspectors the power to suspend or revoke the licenses of a master who has "endangered life" or has been "guilty of * * * negligence" in the performance of his duties. In present day practice the sailors often are supplied through union or other hiring halls. Nevertheless, a captain is "guilty of * * * negligence" if he fail to see to it that the crew shall be a true "complement" "sufficient" for the safe conduct of the voyage, as required by that Act. Where a crew is not first chosen by the captain, he must promptly weed out any who constitute a menace to his general discipline or to the safe navigation of his ship.

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[9]R. S. 4450, now expanded by the Act of May 27, 1936, 49 Stats. 1381, 46 USCA 239.

A crew is not a "complement" or "sufficient" simply because there are enough individuals to fill all the positions required by the United States Inspectors under 46 USCA 222, R. S. 4463, as amended in 40 Stats. 548. This court considered and decided that question with reference to the Chinese crew of the "City of Rio de Janeiro." We denied a limitation of liability to the Pacific Mail Steamship Company because the Chinese, though shown to be excellent sailors, could not understand the commands of the white officers and hence the lifeboats were not launched in sufficient time to save the people on board. Concerning the duty both by the general maritime law and under section 4463 of the Revised Statutes, now 46 USCA 222, we stated and held:

> "It is, as was said by Judge Hawley in Re Meyer (D. C.) 74 Fed. 885, 'the duty of the owners of a steamer carrying goods and passengers, not only to provide a seaworthy vessel, but they must also provide the vessel with a crew adequate in number, and competent for their duty with reference to all the exigencies of the intended route'; not merely competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen, such, for example, as unfortunately did happen in the present case—the striking of the ship on a reef of rocks—and the consequent imperative necessity for instant action to save the lives of passengers and crew. The duty rested

upon the petitioner to be prepared for such an emergency, not only by reason of the statute cited, but by the general maritime law. In the case of The Bark Gentleman, Olcott, 115, Fed. Cas. No. 5,324, it was held that the owners were liable for furnishing an inadequate crew, which they shipped at the Gambia river, West Africa, large enough in numbers, but sick with fever. In Tait v. Levy, 14 East, 482, it was held that, where the captain did not know the coast and entered the enemy's port, and was captured, the vessel was "incompetently fitted out," because there was no proper master for the purpose of the voyage. In Parsons v. Empire Transportation Company, 111 Fed. 202, 208, 49 C. C. A. 302, we held that, where the owners appointed an incompetent superintendent to manage ships in Alaskan waters, they were not entitled to a limitation of liability for loss arising from sending out a barge in wintry and stormy weather. There can, in our opinion, be no doubt that the crew of a ship must be not only sufficient in numbers, but also competent for the duties it may be called upon to perform. * * *."

In Re Pacific Mail S. S. Co., 130 F. 76, 82.

It is obvious that drunken or drink-dulled sailors on lookout or at the wheel well may be as great a menace as the fever stricken crew on the wrecked bark, "Gentleman", or as the Chinese at the life-

boat falls of the "Rio de Janeiro," who could not understand the commands of the officers ordering their launching.

For these reasons we refuse to hold that the habitual drunkard Buckless should have been retained as boatswain to superintend the crew of the "Nevada", or order that the Texas Company make good to him any back pay. We conclude that such an order would not only be in derogation of the efficient enforcement of the Congressional maritime safety laws, but that it would bring discredit to the National Labor Relations Act instead of effectuating its purpose.

With regard to the Board's petition for a restoration of one Rosen, another labor leader on the "Nevada," to the position of quartermaster (helmsman), it is apparent that the issue of the propriety of his discharge was tried by a Board having a misconception of the captain's duty and obligation to all on the vessel with regard to their safety. It appears that after Buckless' discharge, Rosen, as labor leader, proceeded to agitate among the seamen against the captain for his entirely justifiable action. Nothing could be more disruptive of the necessary respect due the captain's proper decision in matters of ship discipline. The fact that Rosen was a labor leader heightened the wrong. During Rosen's active leadership there had been threats of an illegal sit-down strike of the crew because there was among them one member of the International Seaman's Union. There was

a jurisdictional dispute between his C. I. O. union and the I. S. U. and Rosen used the structure of the vessel itself to display on her side a large C. I. O. banner as she came into port. A labor leader so actively engaged in jurisdictional and other agitation among the crew, in part highly improper and in part justified, well may have been absent from his station and inattentive to his duties, as testified by the ship's officers. Cf. Penninsula and Occidental S. S. Co. v. National Labor Relations Board, supra. It is of note that three other active labor leaders not shown to have engaged in conduct subversive to the ship's necessary discipline remain as members of the crew.

Since the entire proceeding was conducted with such an ignoring of the long established Congressional legislation for the protection of life at sea and with such a misconception of the powers of a ship's officers and managers necessary in such protection, we deem it for the best interests of the participating parties and for labor legislation generally to remand to the now reconstructed[10] Board the proceedings leading to those portions of the Board's order, other than that concerning the discharge and back pay of Buckless, for a reconsideration—having in view this opinion. Ford Motor Company v. National Labor Relations Board, 305 U. S. 364, 373; National Labor Relations Board v. Cowell Portland Cement Co., 108 F. (2d) 198, 206

[10]Cf. Opinion of Mr. Justice Frankfurter in Graves v. N. Y. ex rel. O'Keefe, 306 U. S. 466, 487.

(CCA-9); National Labor Relations Board v. Sterling Electric Motors, Inc., 118 F. (2d) 893, 897 (CCA-9), decided March 14, 1941.

We deny enforcement of the order so far as it concerns the discharge and back pay of Buckless.

WILLIAM DENMAN
United States Circuit Judge

CLIFTON MATHEWS
United States Circuit Judge

.....
United States Circuit Judge

Stephens, Circuit Judge (Specially concurring in part and dissenting in part).

I concur in the denial of enforcement of the National Labor Relations Board's order so far as it concerns the discharge and back pay of Buckless, and base my concurrence generally upon the intemperance of this seaman. However, since I am unable to agree completely with the majority opinion upon this subject I confine my concurrence to the result reached.

I believe the order should be enforced as to all other issues and register my dissent as to the conclusions reached by my associates in regard thereto.

ALBERT LEE STEPHENS
U. S. Circuit Judge

[Endorsed]: Filed May 23, 1941.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9518.

THE TEXAS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL MARITIME UNION OF AMERICA,

Intervener.

DECREE

The Texas Company having petitioned this Court on May 7, 1940, to review the order of the National Labor Relations Board herein, entered on January 24, 1940, and the said National Labor Relations Board having filed on Jun 26, 1940, its answer to said petition for review, and its request for enforcement of its said order, and the National Maritime Union of America having been granted permission on June 10, 1940, to intervene in this proceeding, and upon consideration of the foregoing, and of the certified transcript of record transmitted by said National Labor Relations Board,

It Is Ordered, Adjudged and Decreed by this Court that the petition for enforcement of the said Order of the said National Labor Relations Board be, and hereby is denied so far as it concerns the

discharge and back pay of Clarence Buckless; and that this cause be, and hereby is remanded to the said National Labor Relations Board for reconsideration, in accordance with the views expressed in the opinion of this court, of the proceedings leading to those portions of the Board's order, other than that concerning the discharge and back pay of Buckless.

A true copy:
Attest: June 13, 1941.

PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Decree filed and entered May 23, 1941.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10,237

THE TEXAS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD TO SUPPLEMENTAL TRANSCRIPT OF RECORD

The National Labor Relations Board, by its Executive Secretary, duly authorized by the National Labor Relations Board, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding had before said Board in accordance with the opinion of this Court dated May 23, 1941, entitled, "In the Matter of The Texas Company, Marine Division, and National Maritime Union, Port Arthur Branch," the same being Case No. C-1276 before said Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of order vacating order and directing reargument before the National Labor Relations Board, dated June 28, 1941, together with an affidavit of service thereon.

(2) Copy of petitioner's letter of July 3, 1941, requesting permission to file a brief.

(3) Copy of Board's letter of July 8, 1941, granting permission to file brief.

(4) Copy of findings of fact, conclusions of law and decision and order of the National Labor Relations Board, dated July 18, 1942, together with an affidavit of service thereon.

In Testimony Whereof the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set her hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 8th day of October 1942.

[Seal] BEATRICE M. STERN,
Executive Secretary
National Labor Relations
Board

United States of America
Before the National Labor Relations Board

Case No. C-1276

In the Matter of

THE TEXAS COMPANY, MARINE DIVISION

and

NATIONAL MARITIME UNION, PORT ARTHUR BRANCH

ORDER VACATING ORDER, AND DIRECTING REARGUMENT BEFORE THE NATIONAL LABOR RELATIONS BOARD

The Board having issued its Decision and Order herein on January 24, 1940, and, thereafter, the Texas Company having filed a petition in the United States Circuit Court of Appeals for the Ninth Circuit to review and set aside the aforesaid Order, and the Court having duly considered the matter, and on May 23, 1941, entered its decree setting aside the aforesaid Order as to Clarence Buckless and remanding the proceeding to the Board for reconsideration, and the Board having duly considered the matter,

It Is Hereby Ordered that the Order of the National Labor Relations Board issued herein on January 24, 1940, with the exception of paragraph 2 (a) thereof, be, and it hereby is, vacated and set aside; and

It Is Further Ordered that a hearing be held

before the National Labor Relations Board on Thursday, July 17, 1941, at 10:30 a. m. E.S.T., in Room 326, Shoreham Building, Fifteenth and H Streets, N. W., Washington, D. C., for the purpose of reargument and reconsideration in accordance with the opinion of the United States Circuit Court of Appeals dated May 23, 1941.

Dated, Washington, D. C., June 28, 1941.

By direction of the Board:
[Seal] BEATRICE M. STERN,
Executive Secretary.

[Title of Board and Cause.]

AFFIDAVIT AS TO SERVICE

District of Columbia—ss:

I, Vernon S. Green, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 28th day of June 1941, I mailed postpaid, bearing Government frank, by registered mail, a copy of the Order Vacating Order, and Directing Reargument Before the National Labor Relations Board; and letter of transmittal to the following named persons, addressed to them at the following addresses:

The Texas Company, Marine Division
Port Arthur, Texas. 69816

A. E. Van Dusen, Esq.
135 East 42nd St.
New York, N. Y. 69817

J. W. Williams and James H. Pipkin
The Texas Company Bldg.
Port Arthur, Texas. 69818

Mandell & Combs
Att: Herman Wright & W. A. Combs, Esqs.
417 Shell Bldg.
Houston, Texas. 69819

Max Lustig, Esq.
291 Broadway
New York, N. Y. 69820

VERNON S. GREEN

Subscribed and sworn to before me this 28th day of June 1941.

[Seal] IRVING HELBLING

My commission expires Sept. 2, 1945.

(Copy)

THE TEXAS COMPANY
Legal Department
135 East 42nd Street, New York

July 3, 1941

The Texas Company
Case No. C-1276

Mr. Howard F. LeBaron
Executive Assistant,
Field Division,
National Labor Relations Board,
Shoreham Building,
Washington, D. C.

Dear Sir:

This will acknowledge receipt of your letter of June 28th enclosing an order of the Board setting the above matter down for a further hearing on Thursday, July 17, 1941.

This is to advise you that I desire to appear and participate in the argument at this hearing. One-half hour will be ample time to make my argument.

In addition to the time allowed for oral argument, I should also like the Board's permission to file a short brief in support of my contentions. It will be appreciated if you will advise me if this privilege is granted me.

Very truly yours,
s/ ALBERT E. VAN DUSEN,
AEVD:LCT Attorney.

8 July 1941

Albert E. Van Dusen, Esq.
Legal Department, The Texas Company
135 East 42nd Street
New York, N. Y.

Re: The Texas Company
Case No. C-1276

Dear Sir:

This will acknowledge your letter of July 3, advising that you will represent the Respondent at the hearing scheduled for Thursday, July 17, 1941, in the above noted case.

Pursuant to your request for permission to file brief herein, please be advised that you are hereby granted until July 17, 1941 for the filing thereof. This privilege is extended all parties to the proceeding.

Very truly yours,
ESTELLE S. FRANKFURTER
Administrative Assistant

ESF:ANC:hsb
CC—J. W. Williams and James H. Pipkin
The Texas Company Bldg.
Port Arthur, Texas
Mandell & Combs
Att: Herman Wright & W. A. Combs, Esqs.
417 Shell Bldg.
Houston, Texas
Max Lustig, Esq.
29 Broadway
New York, N. Y.

United States of America
Before the National Labor Relations Board
Case No. C-1276

In the Matter of
THE TEXAS COMPANY, MARINE DIVISION

and

NATIONAL MARITIME UNION, PORT ARTHUR BRANCH

Mr. E. P. Davis and Mr. Alba Burnham Martin, for the Board.

Mr. A. E. Van Dusen, of New York City, Mr. James H. Pipkin, of Houston, Tex., and Mr. J. W. Williams, of Port Arthur, Tex., for the respondent.

Mandell & Combs, by Mr. Herman Wright, Mr. W. A. Combs, Mr. Arthur J. Mandell, and Mr. Otto Mullinax, of Houston, Tex., and Mr. Max Lustig, of New York City, for the Union.

Mr. Robert R. Hendricks and Mr. Edward J. Creswell, of counsel to the Board.

DECISION AND ORDER

STATEMENT OF THE CASE

Upon amended charges duly filed by National Maritime Union of America,[1] Port Arthur Branch, herein called the Union, the National Labor Relations Board, herein called the Board, by the Re-

[1]Incorrectly designated in the complaint and other formal papers as "National Maritime Union."

gional Director for the Sixteenth Region (Fort Worth, Texas), issued its complaint dated September 3, 1938, against The Texas Company, Marine Division, New York City and Houston, Texas, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by notice of hearing, were duly served upon the repondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that the respondent discharged and thereafter refused to reinstate 10 of its employees[2] for the reason that they, and each of them, joined and/or assisted the Union and engaged in concerted activities with other employees

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[2]The complaint listed the employees allegedly discharged, the dates of the alleged discharges, and the ships from which they took place, as follows: F. W. Zinkiewycz, April 18, 1938, S. S. Rhode Island; D. G. MacClennan, April 17, 1938, S. S. Rhode Island; C. Buckless, April 18, 1938, S. S. Nevada; J. Gordon Rosen, April 19, 1938, S. S. Nevada; F. W. Zinkiewycz, July 14, 1938, S. S. Washington; C. Buckless, July 14, 1938, S. S. Washington; J. Gordon Rosen, July 14, 1938, S. S. Washington; James P. Blasingame, September 19, 1937, S. S. California; Arthur Spencer, September 19, 1937, S. S. California; J. Gordon Rosen, September 19, 1937, S. S. California; A. P. Lortie, July 30, 1938, S. S. Roanoke; John Helton, July 30, 1938, S. S. Roanoke; C. T. Adams, July 30, 1938, S. S. Roanoke; R. M. Lyons, July 17, 1938, S. S. Roanoke.

of the respondent for the purposes of collective bargaining and other mutual aid and protection, thereby discriminating in regard to the hire and tenure of employment of these employees and discouraging membership in the Union; that, since on or about August 1, 1937, the respondent, through its officers, agents, and employees, has made various statements to its employees discouraging affiliation in, or activity on behalf of, the Union; that, through its officers, agents, and employees, the respondent has denied passes to representatives of the Union to board the respondent's vessels in order to meet with members of the Union, and that, by the aforementioned and other acts, the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

On September 12, 1938, the respondent filed its answer and its amended answer to the complaint, in which it denied having engaged in any unfair labor practices, but admitted that certain of the employees named in the complaint had been discharged and refused reinstatement.[3] In its amended

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[3]The respondent admitted in its amended answer that it had, on the dates given, discharged the following employees from the following named ships; C. Buckless, April 18, 1938, S. S. Nevada; J. Gordon Rosen, April 19, 1938, S. S. Nevada; F. W. Zinkiewycz, July 14, 1938, S. S. Rhode Island; J. Gordon Rosen, July 14, 1938, S. S. Washington; C. T. Adams, July 30, 1938, S. S. Roanoke; A. P. Lortie, July 30, 1938, S. S. Roanoke; John Helton, July 30, 1938, S. S. Roanoke; C. Buckless, July 14, 1938, S. S. Washington.

answer the respondent also admitted that it had denied passes to representatives of the Union to board its vessels, but averred that such denial had not been discriminatory.

Pursuant to notice, a hearing was held at Port Arthur, Texas, from September 12 through September 22, 1938, before Howard Myers, the Trial Examiner duly designated by the Board. The hearing was continued at Port Arthur, Texas, on November 28 and 29, 1938, before Charles E. Persons, another Trial Examiner duly designated by the Board. The Board, the respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

At the beginning of the hearing, counsel for the Board moved to amend the complaint to include an allegation that the respondent discharged and refused to reinstate 2 men[4] not previously named therein for the reason, among others, that they had joined and/or assisted the Union. The Trial Examiner granted the motion without objection. With the consent of all the parties, the respondent's answer was deemed amended to include a denial of the allegation that these 2 men were discharged in

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[4]The names of these employees, the dates of the alleged discharges, and the ships from which they took place are: Rufus H. Andrews, July 8, 1938, S. S. Australia; Jack Wilson, March 17, 1938, S. S. Washington.

violation of the Act. During the course of the hearing, counsel for the Board moved to dismiss the allegations in the amended complaint as to certain discharges of 7 of the 12 employees named.[5] The Trial Examiner granted the motion, which was not opposed. Also during the course of the hearing the respondent made various motions to dismiss the amended complaint in its entirety; to dismiss that portion of the amended complaint which alleged that Rufus H. Andrews and F. W. Zinkiewycz were discharged by the respondent on July 8 and July 14, 1938, respectively, because they had joined and/or assisted the Union; and to strike certain testimony. Decision on these motions was reserved by the Trial Examiner at the hearing. In his Intermediate Report, the Trial Examiner[6] denied the motions to dismiss the amended complaint in its entirety and the motions to strike certain testimony, but granted the motions to dismiss the amended complaint as to Rufus H. Andrews and F. W. Zinkiewycz. At the close of the hearing,

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[5]These seven discharges involved the following employees who were alleged to have been discharged on the following dates from the following ships: F. W. Zinkiewycz, April 18, 1938, S. S. Rhode Island; D. G. MacClennan, April 17, 1938, S. S. Rhode Island; Arthur Spencer, September 19, 1937, S. S. California; John Helton, July 30, 1938, S. S. Roanoke; C. T. Adams, July 30, 1938, S. S. Roanoke; R. M. Lyons, July 17, 1938, S. S. Roanoke; Jack Wilson, March 17, 1938, S. S. Washington.

[6]The Intermediate Report was submitted by Trial Examiner Howard Myers.

counsel for the Board moved to conform the complaint to the proof. This motion was granted by the Trial Examiner. During the course of the hearing the Trial Examiners made rulings on other motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiners and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On May 8, 1939, Trial Examiner Myers filed an Intermediate Report, copies of which were duly served on the parties, finding that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the Act. He recommended that the respondent cease and desist from its unfair labor practices; that it reinstate with back pay 4 of the 12 employees originally named in the amended complaint; and that it take certain affirmative action to remedy the situation brought about by the unfair labor practices. He dismissed the allegations of the complaint, as above stated, with respect to Rufus H. Andrews and F. W. Zinkiewycz. The respondent filed a Statement of Exceptions to the Intermediate Report and to the record on July 14, 1939, and a brief in support of the Statement of Exceptions on July 17, 1939.

Pursuant to notice duly served upon the respondent and upon the Union, a hearing for the purpose of oral argument was held on October 24, 1939,

before the Board in Washington, D. C. The respondent and the Union were represented by counsel and participated in the argument.

On January 24, 1940, the Board issued a Decision and Order in the case.[7] The Board found in its Decision that the respondent, by warning its employees against union organization and by other acts, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8 (1) thereof; and that the respondent, by discharging Clarence Buckless on April 18, 1938, and J. Gordon Rosen on April 19 and July 14, 1938, and thereafter refusing to reinstate them, because of their union affiliation and activities, engaged in unfair labor practices within the meaning of Section 8 (3) and (1) of the Act. The Board ordered the respondent to reinstate Rosen with back pay, and awarded back pay to Buckless whom the respondent had already reinstated.

On May 7, 1940, the respondent filed a petition for review of the Board's Decision and Order in the United States Circuit Court of Appeals for the Ninth Circuit, and on June 24, 1940, the Board filed an answer requesting enforcement of its Order. Upon briefs filed by the respondent and the Board, and after oral argument in which the respondent

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[7]Matter of The Texas Company, Marine Division and National Maritime Union, Port Arthur Branch, 19 N.L.R.B. 835.

and the Board participated by counsel, the Court, on May 23, 1941, entered its opinion and a decree denying enforcement of the Board's Order as to Buckless and remanding the remaining portions of the Order to the Board for reconsideration in the light of certain maritime safety statutes to which the Court adverted in its opinion.

On June 28, 1941, the Board vacated and set aside its Decision and Order of January 24, 1940, with the exception of paragraph 2 (a)[8] thereof. Pursuant to notice duly served upon the respondent and the Union, a hearing for the purpose of reargument was held before the Board in Washington, D. C., on July 17, 1941. The respondent and the Union were represented by counsel and participated in the argument, and the respondent then filed a brief which the Board has considered.

Upon the entire record, and pursuant to the remand of the United States Circuit Court of Appeals for the Ninth Circuit, the Board makes the following:

FINDINGS OF FACT

I. The business of the respondent

The respondent, The Texas Company, a wholly owned subsidiary of The Texas Corporation, is a Delaware corporation, with its principal business

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[8]In this paragraph back pay was awarded Buckless. As noted above, enforcement of the Board's Order as to Buckless was denied by the Circuit Court of Appeals.

and executive offices located at New York City and Houston, Texas. It is engaged chiefly in the production, distribution, and sale of petroleum and petroleum products. The respondent operates refineries in Texas at Galena Park, Port Arthur, and Port Neches. In addition, at Port Neches, it operates a factory for the manufacture of roofing materials, barrels, and various other products.

Chief products of the Galena Park refinery are gasoline and fuel oils. The crude oil used in their manufacture comes principally from producing wells in Texas and New Mexico through pipe lines operated by the Texas New Mexico Pipe Line Company. This company is a common carrier with tariffs prescribed by the Interstate Commerce Commission. A majority of its stock is owned by The Texas Corporation. The average daily throughput of the Galena Park refinery is approximately 20,000 barrels of crude oil. Of the finished products, approximately 75 percent is shipped out of Galena Park on board seagoing tankers to points outside the State of Texas.

The principal products manufactured at the respondent's Port Neches works are roofing, asphalt, steel barrels, wood barrels, and drums. The principal raw materials used are crude oil, felt, sheet steel, wood staves, slate, paper, and nails. The daily average throughput of crude oil is approximately 25,000 barrels. Most of the crude oil is obtained from Texas and Louisiana, but substantial quantities arrive by tanker and barge from Mexico. All

of the felt, slate, sheet steel, and paper is procured from outside the State of Texas.

The unfinished crude distillates from both the Galena Park and Port Neches refineries are pumped to the respondent's Port Arthur refinery where the refining process is completed. In refined form, a substantial percentage of the crude-oil distillates pumped to Port Arthur eventually reaches a destination outside the State of Texas.

Products of the respondent are, in part, distributed through 2,100 wholesale outlets and over 40,000 retailers located in most of the States of the United States. Gross receipts of the respondent for the fiscal year ending December 31, 1937, were in excess of $280,000,000. In the respondent's franchise-tax return to the Secretary of State of Texas, covering the year 1937, over 86 per cent of its business was reported as interstate in character and approximately 13 percent was reported as intrastate.

The respondent owns, maintains, and operates through its Marine Division approximately 28 oceangoing vessels having an average capacity of 11,000 tons. These vessels are used by the respondent in transporting its petroleum products between various ports in the Gulf of Mexico and other ports of the United States, and to and from Europe, South America, and other points.

II. The organization involved

National Maritime Union of America, Port Arthur Branch, is a labor organization affiliated

with the Congress of Industrial Organizations. It admits to membership all unlicensed seamen employed by the respondent.

III. The unfair labor practices

The Board, in its original Decision, dismissed the complaint insofar as it alleged that the respondent had refused to issue passes to union representatives, in violation of Section 8 (1) of the Act, and that the respondent had discriminated in regard to the hire and tenure of employment of Rosen and Blasingame by discharging them from the S. S. California during September 1937, of Lortie, Zinkiewycz, and Andrews, by discharging them from the S. S. Roanoke, S. S. Australia, and S. S. Washington during July 1938, and of Buckless by discharging him from the S. S. Washington on July 14, 1938, in violation of Section 8 (3) and (1) of the Act.[9] Since those sections of the Board's original Decision dealing with the dismissed allegations of the complaint were not the basis of any part of the Board's Order which was before the Court on the petition for review, they are not within the scope of the Court's remand and will not, therefore, be reconsidered.

A. Interference, restraint, and coercion

Both J. Gordon Rosen and James P. Blasingame were hired by the respondent on or about June 30, 1937, at Port Arthur, Texas, and were assigned to the S. S. California as able-bodied seaman and quartermaster, respectively.

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[9] 19 N.L.R.B. 835.

When Rosen went on board, he reported for duty to Earl Baldwin, then acting first mate of the S. S. California. According to Rosen's account of the ensuing conversation, Baldwin stated to him, "Just a minute, there is one thing I want to tell you we don't allow on this ship, and that is getting drunk, missing watches, and we don't allow any agitation with the crew on this union business." Blasingame gave a similar account of his first conversation with Baldwin. He testified that, when he boarded the S. S. California, Baldwin warned him against three things: "drunkenness," "missing watches," and "union agitating."

Soon after Rosen and Blasingame went to work on the S. S. California, its regular first mate, Dave Rosen, returned to the ship from a leave of absence, and Earl Baldwin was shifted back to his regular position as second mate. As such, Baldwin was in charge of the 12 to 4 watch during which Blasingame, as quartermaster, steered the ship.

In the course of their duties, Blasingame and Baldwin were frequently on the bridge together and engaged in various conversations. Concerning these conversations, Blasingame testified that Baldwin told him how the ship had been run without union men aboard and how he (Baldwin) had to get rid of a man "because he was agitating union all the time." On one occasion, according to Blasingame, a newly hired seaman came aboard wearing a union button. Baldwin, upon seeing it, remarked, "There is a man who won't ride this ship long." At an-

other time, Blasingame testified, Baldwin asked him if a certain new seaman was a "rank and file."[10] Blasingame replied that he did not know, and Baldwin said, "Well, if he is he won't be on this ship very long."

Blasingame also testified that Baldwin asked him about his own union affiliation as well as that of various other crew members, including J. Gordon Rosen. Blasingame avoided giving a direct answer to the question as to his own membership in the Union, he testified, and told Baldwin that he knew nothing about the membership of the others.

On the termination of this voyage, both Blasingame and J. Gordon Rosen left the ship. When J. Gordon Rosen was being paid off, Baldwin commented on Rosen's termination of employment as follows: "Well, you know we don't want any agitating back there."

Baldwin testified that, when J. Gordon Rosen and Blasingame first boarded the S. S. California, he simply told them to go to their quarters. He denied warning them against "union agitation." Although he admitted having had, as second mate, various conversations with Blasingame, he flatly denied each and every anti-union statement attributed to him by the latter. Trial Examiner Myers, before whom Baldwin testified, did not credit Baldwin's denials, nor do we. We find that Baldwin made

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[10]During the first stages of its organization, and for some time thereafter, the Union was commonly referred to as the "rank and file."

the statements attributed to him by J. Gordon Rosen and Blasingame, substantially as recited above.

As acting first mate on the S. S. California when J. Gordon Rosen and Blasingame were hired and when he warned them against "union agitation," Baldwin was second in authority only to the captain. As second mate at the time of his various conversations with Blasingame on the bridge of the S. S. California, Baldwin was the third ranking officer on the ship. During the absence of his superior officer or officers, Baldwin was in complete charge of the ship. He was at all times in charge of the deck crew during one watch of 8 hours each day. The respondent is clearly accountable for the anti-union statements made by him.[11]

We find that the resondent, by warning its emloyees against union organization, by threatening the discharge of union members, and by questioning an employee concerning the identity of union members, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

B. The shipping articles

As stated above, the amended complaint charges the respondent with having discharged and refused

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[11]Cf. Virginia Ferry Corporation v. National Labor Relations Board, 101 F. (2d) 103 (C.C.A. 4), enf'g as mod. Matter of Virginia Ferry Corporation, 8 N.L.R.B. 730.

to reinstate various employees, in violation of Section 8 (3) of the Act.

It is undisputed that each seaman involved in the alleged discharges, which are discussed below, signed shipping articles required by law,[12] and that each received his discharge certificate[13] at the port at which he had originally embarked. The respondent contends that there is and can be no issue of unlawful discharge in this proceeding, because the shipping articles constituted contracts of employment under which the employment relationship was terminated, as a matter of law, at the end of the particular voyages concerned.

We do not concur in this view. It is clear from the record that the termination of a voyage does not, as a matter of fact, terminate the employment relationship between the respondent and the members of the crew. With the exception of those seamen who either quit or are dismissed, the crew continues in the performance of its duties. Regular watches are maintained and the seamen remain subject to the orders of their ship's officers. Ordinarily the same crew goes on the succeeding voyage.

Despite the fact that seamen may have concurrently signed shipping articles for a voyage, the respondent may dismiss them on different days upon or after the end of the voyage, thus indicat-

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[12]46 U.S.C.A., Sec. 564; 46 U.S.C.A., Sec. 574.

[13]In the event that a seaman quits a particular vessel or is dismissed for any reason, the law requires that he be given a discharge certificate. 46 U.S.C.A., Sec. 643.

ing that it is the dismissal by the respondent's officers rather than the completion of the voyage which terminates the employment relationship. Furthermore, the respondent's working rules provide that "all unlicensed personnel with one year of continuous service shall be given an annual vacation of one week with pay," and that "those in continuous service for two years or more shall be given an annual vacation of two weeks with pay." Since shipping articles signed by the respondent's seamen are never for voyages lasting as long as a year, these provisions of the working rules would be meaningless if, as the respondent contends, the employment relationship ended upon the completion of each voyage.

On the basis of all the evidence, we find that, notwithstanding termination of a particular voyage, the employee relationship of each member of the crew on the respondent's ships here involved continued until he quit or until he was dismissed for lawful cause.[14]

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[14]South Atlantic Steamship Company of Delaware v. National Labor Relations Board, 116 F. (2d) 480 (C.C.A. 5), enf'g mod. Matter of South Atlantic Steamship Company of Delaware, 12 N.L.R.B. 1367, cert. denied, 313 U. S. 582; National Labor Relations Board v. Waterman Steamship Corporation, 309 U. S. 206, rev'g 103 F. (2d) 157 (C.C.A. 5), mod. Matter of Waterman Steamship Corporation, 7 N.L.R.B. 237. See Southern Steamship Company v. National Labor Relations Board, 62 S.Ct. 886, rev'g and rem'd'g 120 F. (2d) 505 (C.C.A. 3), enf'g as mod. Matter of Southern Steamship Company, 23 N.L.R.B. 26.

C. The discharge of J. Gordon Rosen from the S. S. "Nevada".

On January 10, 1938, J. Gordon Rosen was again hired by the respondent and was assigned to the S. S. Nevada as an able-bodied seaman. When Rosen boarded the S. S. Nevada he found that the entire crew, with the exception of one man, was composed of members of the Union.

Rosen at once became active in affairs of the Union. He presided over meetings held in the crew's quarters each week and acted as a delegate to discuss various controversial grievances with the ship's officers. He drafted a letter, copies of which the crew sent through the mails and hiring halls to crews of the respondent's other ships, urging them to join the Union. It is clear that Rosen was outstanding as an active union leader on board the S. S. Nevada, and that the ship's officers were aware of his activity.

On April 18, 1938, when the S. S. Nevada docked at Port Arthur, Buckless was discharged by Captain Swanson. Rosen, as crew delegate, immediately protested Buckless' discharge to First Mate Tranberg and was, in turn, discharged on the following day. Tranberg, in answer to Rosen's request for an explanation of his discharge, stated, "Well, it might be for the reason that your work is not satisfactory."

The respondent contends that Rosen's employment was terminated because he was lazy and inattentive to duty. Tranberg testified that Rosen seemed to "intentionally lag behind in his work,"

and that on various occasions he left his post when he was supposed to be on watch and went aft to play cards, write, or smoke. Captain Swanson testified that Rosen appeared to be "purely lazy" and that Tranberg had often complained about his work. Rosen denied that he had been derelict in the performance of any of his duties. It is clear, and we find, that he did not use tobacco. The respondent's charge of neglect of duty on the part of Rosen is also refuted by Rosen's long record at sea,[15] and his previous admittedly satisfactory service with the respondent as quartermaster on the S. S. Nevada in 1935, and as temporary boatswain on the S. S. California in 1937.[16]

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[15]At the time of the hearing, Rosen had had 10 years' experience as a seaman.

[16]As discussed below, less than a month and a half after Rosen had received his discharge papers from the S. S. Nevada, he was rehired by the respondent on the S. S. Washington. In its brief and at the oral argument, the respondent urged that the fact that Rosen was rehired demonstrates that he had not been discharged from the S. S. Nevada because of his activity in the Union. We do not believe that this argument resolves any of the issues. It might equally well be urged that the respondent would not have rehired Rosen, as it did, if he was in fact negligent and lazy. The record indicates that, insofar as the hiring of unlicensed seamen is concerned, each of the respondent's ships was operated largely as a separate unit, obtaining its employees from any of various uncoordinated agencies. A man might therefore be discharged from one of the respondent's ships and thereafter be rehired on another, the rehiring having little or no bearing upon the merits of, or the reasons for, the previous discharge.

We believe that the reasonable resolution of this conflicting testimony, as well as the respondent's reason for discharging Rosen, is revealed by the testimony of Leo Herman and George Hart. Herman, who was not a member of the Union, was hired as a seaman on the S. S. Nevada on April 19, 1938, some hours after Buckless' dismissal but before Rosen's discharge. Rosen and other union members voiced strenuous objection to Herman's employment, because of his non-union status. Herman reported this to Tranberg, who questioned him as to the identity of the objectors. Herman testified that, when he refused to divulge this information, Tranberg remarked:

> I know who you had the conversation with. It was Baldy.[17] Baldy is a good man but he let the Union go to his head. We had a boatswain on here; he done the same thing. Every time a [new] man comes on board he asked him if he had a union book.

Nine days later, Tranberg told Herman, according to the latter's testimony, that:

> he [Tranberg] fired Baldy on account of union activities but that is not the reason he gave him * * * the only reason he [Tranberg] told me was that I told him I didn't belong to the N.M.U. * * *

Quartermaster Hart of the S. S. Nevada corroborated the first of these two conversations, which

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[17]Rosen was commonly called "Baldy."

he had overheard, and testified that, prior to Rosen's discharge, when Tranberg was investigating the crew's opposition to Herman's employment, he directed Hart to

> tell those people I don't want none of that kind of stuff on here. I am not going to have it. I thought I got rid of that when I got rid of that fellow yesterday.

Hart testified that Tranberg's allusion to "that fellow" was to Boatswain Buckless, who had been discharged on the previous day. It is apparent from Tranberg's remark that further punitive measures were contemplated at that time. Tranberg denied the statements attributed to him by Herman, but did not testify as to his conversation with Hart. On the entire record, we credit the testimony of Herman and Hart, and we find that the respondent discharged J. Gordon Rosen from the S. S. Nevada because of his union membership and activities, thereby discriminating in regard to his hire and tenure of employment, discouraging membership in the Union, and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

D. The discharge of J. Gordon Rosen from the S. S. "Washington."

J. Gordon Rosen was unemployed from the time he left the S. S. Nevada until June 1, 1938, when he was rehired by the respondent as an able-bodied seaman on the S. S. Washington. As in the case of his previous employment with the respondent, Rosen

became outstandingly active in the affairs of the Union soon after his arrival on the ship. He presided over meetings and was elected a delegate. In that capacity, from time to time, he presented various grievances of the crew to Captain Bergman of the S. S. Washington. Bergman told Rosen that the respondent "didn't recognize any union," but discussed the various grievances with him. On July 11, 1938, Rosen drafted and signed an open letter from the crew of the S. S. Washington to the crews of all other ships owned by the respondent, urging them to organize and severely criticizing the respondent because it allegedly refused to improve the working conditions of its employees. Rosen also sent a telegram to J. P. Roney, general manager of the respondent's marine department, complaining that the captain of the S. S. Washington refused to recognize the delegates of the Union. It is clear that the officers of the S. S. Washington had knowledge of Rosen's activity on behalf of the Union.

On July 14, 1938, at Port Arthur, the first mate, C. B. Johannesen, told Rosen that he was "fired" because of "unsatisfactory seamanship." This occurred a few hours after Rosen, as delegate of the Union, had taken up an overtime dispute with C. L. Hand, the port captain, who refused to recognize him as union delegate. Rosen protested his discharge to First Mate Johannesen, who thereupon withdrew his original reason for Rosen's discharge and admitted that he had nothing against Rosen's seamanship. Johannesen then told Rosen that his slowness at work was the reason for his discharge.

Captain Bergman and Mate Johannesen testified that Rosen on various occasions was negligent and lazy. On the other hand, there is substantial evidence to the contrary. Furthermore, several of the instances of laziness attributed to Rosen by Mate Johannesen occurred, according to the latter's own testimony, during the first voyage of the S. S. Washington, after which Rosen was shipped on the second voyage. We are not convinced that this was done, as the respondent contends, merely to give Rosen "another chance." In view of Rosen's long experience as a seaman and his previous satisfactory record with the respondent, we find, as did the Trial Examiner, that neither Bergman's nor Johannesen's testimony as to Rosen's negligence and laziness is entitled to credence. The notation made by Captain Bergman in the crew list, that Rosen was discharged for "incompetency," is, in our opinion, no more persuasive than the testimony given by Bergman at the hearing.

On the basis of the entire record, we find, as did the Trial Examiner, that the respondent discharged Rosen from the S. S. Washington on July 14, 1938, and thereafter refused to reinstate him, because of his union membership and activities, thereby discriminating in regard to his hire and tenure of employment, discouraging membership in the Union, and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

E. Marine Safety Legislation.

Pursuant to the decree of the Circuit Court of Appeals, we have carefully reconsidered our findings as to the respondent's unfair labor practices in the light of the Court's opinion and of the traditional need for safety and discipline aboard ship. We appreciate the importance of the legislation to which the Court refers in its opinion[18] and recognize our task of accommodating the "scheme" of the Act to "other and equally important Congressional objectives." We take note that the amendments to the Merchant Marine Act of 1936 (49 Stat. 1985) enacted by Congress in 1938 (52 Stat. 965, 46

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[18]This legislation, briefly summarized, is as follows:

18 U.S.C.A., Sec. 484, Article 293: provides a fine and imprisonment for a member of a crew unlawfully and by force, fraud, or intimidation, to usurp the command of a vessel from its master.

46 U.S.C.A., Sec. 701, Articles Fifth and Sixth: provide for the punishment of a crew member for continued willful disobedience or neglect of duty at sea; and for assaulting a master, mate or other officer.

46 U.S.C.A., Sec. 239: provides that inspectors shall investigate all acts of misconduct committed by any licensed officer, whose license shall be suspended if the inspectors are satisfied after a hearing that the officer is incompetent or has been guilty of misbehavior, negligence, or unskilfulness, or has endangered life wilfully.

46 U.S.C.A., Secs. 226, 228, 229: provide that licenses of captains, mates, and engineers shall be suspended on satisfactory proof of intemperate habits.

46 U.S.C.A., Sec. 222: requires that a vessel shall only be operated with a full complement of officers and crew, and provides that a captain is liable to fine or penalty for failing to explain to the local inspectors the reason for any deficiency in complement.

U.S.C.A., Secs. 1251-1262) added to that Act a title on maritime labor relations declaring a policy of encouraging collective bargaining among maritime employees and affirming the applicability of the National Labor Relations Act to them.[19] Seamen who have engaged in conduct condemned as illegal by other legislation have indeed been denied reinstatement under the Act,[20] but our own decisions and those of the courts have frequently and consistently recognized the general applicability of the Act to maritime employees.[21]

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[19]This affirmation of the applicability of the Act is contained in Section 1002 of the Merchant Marine Act, which was added in June 1938 by 52 Stat. 965, 46 U.S.C.A., Sec. 1252. The 1938 amendments originally were to expire in 3 years, on June 23, 1941, but the life of some of the sections added by these amendments, including Section 1002, was extended until June 23, 1942, by Public L. No. 124, 77th Cong., 1st Sess.

[20]Southern Steamship Company v. National Labor Relations Board, 62 S.Ct. 886, rev'g and rem'd'g 120 F. (2d) 505 (C.C.A. 3), enf'g as mod. Matter of Southern Steamship Company, 23 N.L.R.B. 26.

[21]See, e. g., National Labor Relations Board v. Waterman Steamship Corporation, 309 U.S. 206, rev'g 103 F. (2d) 157 (C.C.A. 5), mod. Matter of Waterman Steamship Corporation, 7 N.L.R.B. 237; Black Diamond Steamship Corporation v. National Labor Relations Board, 94 F. (2d) 875 (C.C.A. 2), enf'g Matter of Black Diamond Steamship Corporation, 3 N.L.R.B. 84, cert. denied, 304 U.S. 579; South Atlantic Steamship Company of Delaware v. National Labor Relations Board, 116 F. (2d) 480 (C.C.A. 5), enf'g as mod. Matter of South Atlantic Steamship Company of Delaware, 12 N.L.R.B. 1367, cert. denied, 313 U.S. 582.

Protection by law of the right to organize and bargain collectively has also been extended by Congress to employees engaged in other hazardous occupations. Railroad employees and employees of common carriers by air, although employed in industries covered by extensive safety legislation, have, for example, expressly been given guarantees in the Railway Labor Act substantially similar to those contained in the National Labor Relations Act. Similarly, although the hazardous nature of the mining industry has long been recognized in safety legislation, the applicability of the National Labor Relations Act to mining employees is well-established.[22]

Certainly it cannot with reason be said that ship's officers must be permitted to engage in anti-union conduct and statements if safety and discipline aboard ship are to be preserved. Any such holding would in effect mean that normal union activities create otherwise non-existent dangers and interfere with discipline and good order. Experience provides no basis for any such proposition. On the con-

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[22]See, e. g., Matter of Crowe Coal Company and United Mine Workers of America, District No. 14, 9 N.L.R.B. 1149, enf'd in National Labor Relations Board v. Crowe Coal Company, 104 F. (2d) 633 (C.C.A. 8), cert. denied, 308 U.S. 584; Matter of Nevada Consolidated Copper Corporation and International Union of Mine, Mill and Smelter Workers, 26 N.L.R.B. 1182, set aside in National Labor Relations Board v. Nevada Consolidated Copper Corporation, 122 F. (2d) 587 (C.C.A. 10), rev'd, 62 S.Ct. 960.

trary, Congress has found in the Act that "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury * * *" (Section 1). Upon reconsideration, therefore, we are of the opinion and we find that considerations of marine safety and discipline give no reason for disturbing our findings in Section III A, above, as to the respondent's interference with, restraint, and coercion of its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Nor do we believe that prevention under the Act of discrimination by maritime employers against seamen who have engaged in concerted activities is in any sense incompatible with the marine safety legislation to which the Court refers in its opinion.[23] To say that "the fact that Rosen was a labor leader heightened the wrong" of the activity in which he engaged is to justify the discharge of active union members for conduct which in others might be regarded as not improper. Similarly, to presume that a seaman who leads his fellows in union activity "well may have been absent from his station and inattentive to his duties" is to make union activity prima facie evidence of carelessness or incompetence. Either would make possible

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[23]Section 1002 of the Merchant Marine Act of 1936, as amended, expressly provided that "enforcement of any of the navigation laws of the United States or any other laws relating to seamen" shall not be affected. 52 Stat. 965, 46 U.S.C.A., Sec. 1252.

the discharge of seamen who are active union members or officers almost without reference to the propriety or impropriety of their activities according to normal standards and without regard for the proscriptions contained in the Act.

In any event, the record shows that Rosen's union activities neither endangered discipline nor interfered with his work, and we find that the respondent in discharging him was not moved by any such considerations. Rosen's union activities on board the S. S. Nevada and the S. S. Washington consisted of presiding over weekly union meetings held in the crew's quarters, acting as delegate to discuss grievances with the ship's officers, drafting letters urging the crews of the respondent's other ships to join the Union and criticizing the respondent for its alleged refusal to improve working conditions, and protesting to the respondent's general manager the refusal of the catpain of the S. S. Washington to recognize the delegates of the Union. There is nothing in the record to indicate that these activities endangered the safety of the respondent's ships on which Rosen worked or of the cargoes they carried, or that his union activities were detrimental to discipline on board those ships, within the meaning of the legislation to which our attention has been directed. Hence there is no basis for concluding that any of these Congressional enactments were violated by Rosen and it does not appear that he was prosecuted for any criminal offense in that respect. There is, therefore, no basis for believing

that Rosen's reinstatement with back pay involves any such threat to discipline or safety or any such conflict with marine safety legislation as to require us to deny this normally applicable remedy. Upon reconsideration, we find no reason to alter our conclusion that Rosen was discriminatorily discharged and that his reinstatement with back pay will effectuate the purposes of the Act.[24]

IV. The effect of the unfair labor practices upon commerce.

The activities of the respondent set forth in Section III A, C, and D above, occurring in connection with its operations described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

We have found that the respondent, by its anti-union statements and in other ways, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act. We shall order the respondent to cease and desist from such practices.

We have found that the respondent discriminatorily discharged J. Gordon Rosen from the S. S.

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[24]We have not vacated our original order with respect to Buckless, and we therefore do not reconsider his case, although the same considerations apply to his union activities as to those of Rosen.

Nevada on April 19, 1938, and from the S. S. Washington on July 14, 1938. We shall therefore order the respondent to offer Rosen immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges, which we find is necessary to effectuate the purposes and policies of the Act even though he may have obtained substantially equivalent employment elsewhere.[25] We shall further order the respondent to make Rosen whole for any loss of pay suffered by him by reason of his discharges by payment to him of a sum equal to the amount which he normally would have earned as wages from April 19, 1938, the date of his discharge from the S. S. Nevada, to June 1, 1938, when he was rehired on the S. S. Washington, and from July 14, 1938, the date of his discharge from the S. S. Washington, to the date of the offer of reinstatement, less his net earnings[26] during such periods.

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[25]See Phelps Dodge Corporation v. National Labor Relations Board, 313 U. S. 177, mod'f'g and rem'd'g 113 F. (2d) 202 (C.C.A. 2), enf'g as mod. Matter of Phelps Dodge Corporation, 19 N.L.R.B. 547; National Labor Relations Board v. Blanton Co., 121 F. (2d) 564 (C.C.A. 8), enf'g as mod. Matter of Blanton Co., 16 N.L.R.B 951, as amended by 18 N.L.R.B 143; Matter of Ford Motor Company and International Union, United Automobile Workers of America, Local Union No. 249, 31 N.L.R.B. 994.

[26]By "net earnings" is meant earnings less expenses, such as for transportation, room, and board,

Since J. Gordon Rosen, while in the employ of the respondent, received maintenance on board ship in addition to his wages, we shall order that the reasonable value of such maintenance during the periods for which we shall award back pay be included in the total amount to be paid him by the respondent.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Board makes the following:

CONCLUSIONS OF LAW

1. National Maritime Union of America, Port Arthur Branch, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of J. Gordon Rosen, thereby discouraging membership in National Maritime Union of America, Port Arthur Branch, the respondent has engaged in and is engaging in unfair

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incurred by an employee in connection with seeking work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590, 8 N.L.R.B 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See Republic Steel Corporation v. National Labor Relations Board, 311 U. S. 7.

labor practices, within the meaning of Section 8 (3) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, The Texas Company, Marine Division, New York City and Houston, Texas, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in National Maritime Union of America, Port Arthur Branch, or any other labor organization of its employees by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment, or any terms or conditions of their employment, because of membership or activity in any such labor organization;

(b) In any other manner interfering with, re-

straining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed by Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to J. Gordon Rosen immediate and full reinstatement to the position held by him on July 14, 1938, or to a substantially equivalent position, without prejudice to his seniority or other rights and privileges;

(b) Make whole J. Gordon Rosen for any loss of pay he may have suffered by reason of the respondent's discrimination in regard to his hire and tenure of employment by payment to him of a sum of money equal to the amount which he normally would have earned as wages,—including the reasonable value of his maintenance on board ship,—from April 19, 1938, to June 1, 1938, and from July 14, 1938, to the date of the respondent's offer of reinstatement, less his net earnings during such periods;

(c) Immediately post notices to its employees in conspicuous places on its docks and vessels, and maintain such notices for a period of at least sixty (60) consecutive days from the date of posting, stating: (1) that the respondent will not engage

in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of his Order; (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) of this Order; and (3) that the respondent's employees are free to become or remain members of National Maritime Union of America, Port Arthur Branch, and that the respondent will not discriminate against any employee because of his membership in or activity in behalf of said organization;

(d) Notify the Regional Director for the Sixteenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply therewith.

Signed at Washington, D. C., this 18 day of July 1942.

HARRY A. MILLIS
Chairman
WM. M. LEISERSON
Member
[Seal] NATIONAL LABOR RELATIONS BOARD

[Title of Board and Cause.]

AFFIDAVIT AS TO SERVICE

District of Columbia—ss.

I, James B. Minor, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of

said Board in Washington, D. C.; that on the 18th day of July, 1942, I mailed postpaid, bearing government frank, by registered mail, a copy of the Decision and Order to the following named persons, addressed to them at the following addresses:

The Texas Company, Marine Division
Port Arthur, Texas (69347)

A. E. Van Dusen, Esquire
135 East 42nd Street
New York, N. Y. (69348)

Messrs. J. W. Williams and James H. Pipkin
The Texas Company Building
Port Arthur, Texas (69349)

Mandell & Combs
Att: Herman Wright & W. A. Combs, Esquires
417 Shell Building
Houston, Texas (69350)

Max Lustig, Esquire
291 Broadway
New York, New York (69351)

JAMES B. MINOR

Subscribed and sworn to before me this 18th day of July, 1942.

[Seal] KATHRYN B. HARRELL

Notary Public, D. C. My Commission expires March 1, 1947.

[Endorsed]: No. 10237. United States Circuit Court of Appeals for the Ninth Circuit. The Texas Company, Petitioner, vs. National Labor Relations Board, Respondent. Supplemental Transcript of Record. Upon Petition to Review and Enforce an Order of the National Labor Relations Board.

Filed October 13, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the
United States Circuit Court of Appeals
For the Ninth Circuit

No. 10237

THE TEXAS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REVIEW

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, The Texas Company, respectfully shows and alleges:

I. That your petitioner is, and at all times here-

inafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and qualified to do business as a foreign corporation in the States of Montana, Idaho and Arizona; and that it is now and at all times hereinafter mentioned has been transacting business in the said States of Montana, Idaho and Arizona, and within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

II. That heretofore and on or about September 3, 1938, upon charges filed by the National Maritime Union of America, Port Arthur Branch (hereinafter called the "Union"), the respondent, National Labor Relations Board (hereinafter sometimes referred to as the "Board"), issued a complaint against your petitioner alleging that your petitioner had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act (hereinafter sometimes referred to as the "Act"), 49 Stat. 449, in that your petitioner had (1) discharged and refused to reinstate certain seamen, (2) through its officers, agents and employees, made various statements to its employees discouraging affiliation in or activity on behalf of the Union, and (3) denied passes to representatives of the Union to board petitioner's vessels to contact members of the Union, all in violation of said Act.

III. That on or about September 12, 1938, your

petitioner duly served and filed its answer and amended answer to said complaint in which your petitioner denied that it had engaged in or was engaging in any unfair labor practices or had violated the Act as alleged in said complaint.

IV. That issue having been joined in the said proceeding between the Board and your petitioner, a hearing was held at Port Arthur, Texas, from September 12 to 16 and from September 19 to 22, 1938, before Howard Myers, a Trial Examiner duly designated by the Board, and a further hearing was held also at Port Arthur, Texas, on November 28 and 29, 1938, before Charles E. Persons, another Trial Examiner duly designated by the Board.

V. That at the opening and close of the Board's case and at the close of the entire case, your petitioner duly moved to dismiss the Board's complaint and all proceedings thereunder on the ground that no cause of action was alleged or proved, but said motions were denied by the Trial Examiner.

VI. That on or about May 8, 1939, Trial Examiner Myers filed his Intermediate Report, in which he found and concluded that petitioner had engaged in unfair labor practices and in which he recommended that petitioner take certain affirmative action to remedy the situation brought about by such unfair labor practices, including reinstatement with back pay of four seamen.

VII. That on October 24, 1939, oral argument of counsel was had before the Board upon the issues of fact and of law in said proceedings, in which

argument counsel for your petitioner prayed that said complaint and the proceedings thereunder be dismissed upon the grounds set forth in petitioner's various motions to dismiss and in petitioner's exceptions to the Trial Examiner's Intermediate Report and upon the further ground that neither the acts of your petitioner alleged in said complaint nor the acts of your petitioner as shown in the testimony or other evidence at the hearing constituted any violation of the National Labor Relations Act, 49 Stat. 449, or of any other law or statute, the enforcement of which is entrusted to the Board.

VIII. That on or about January 24, 1940, the said Board did make and file its decision and final order in the said proceedings, which decision and order was served on your petitioner by mail on January 24, 1940.

IX. That on or about May 7, 1940, a petition for a review of the aforesaid order and decision was filed with this Court and on June 24, 1940, the Board filed an answer thereto requesting enforcement of its order.

X. Upon briefs filed by petitioner and the Board, and after oral argument in which petitioner and the Board participated by counsel, this Court, on May 23, 1941, entered its opinion (now officially reported in 120 F. (2d) 186), and a decree denying enforcement of the Board's aforesaid order as to one Clarence Buckless, a seaman, and remanding the remaining portions of such order to the Board for reconsideration in the light of the Court's opin-

ion and particularly certain maritime safety statutes to which the Court adverted in its opinion.

XI. That on June 28, 1941, and pursuant to this Court's opinion and decree above referred to, the Board vacated and set aside its decision and order of June 24, 1940, with the exception of paragraph 2(a) thereof, and, pursuant to notice served upon the petitioner and the Union, a hearing for the purpose of reargument was held before the Board in Washington, D. C. on July 17, 1941, at which hearing the petitioner and the Union were represented by counsel.

XII. Thereafter, or on July 18, 1942, the Board handed down a decision signed by only two members of the Board, by which your petitioner was ordered to:

"1. Cease and desist from:

(a) Discouraging membership in National Maritime Union of America, Port Arthur Branch, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment, or any terms or conditions of their employment, because of membership or activity in any such labor organization;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain

collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed by Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to J. Gordon Rosen immediate and full reinstatement to the position held by him on July 14, 1938, or to a substantially equivalent position, without prejudice to his senority or other rights and privileges;

(b) Make whole J. Gordon Rosen for any loss of pay he may have suffered by reason of respondent's discrimination in regard to his hire and tenure of employment by payment to him of a sum of money equal to the amount which he normally would have earned as wages, —including the reasonable value of his maintenance on board ship,—from April 19, 1938, to June 1, 1938, and from July 14, 1938 to the date of the respondent's offer of reinstatement, less his net earnings during such periods;

(c) Immediately post notices to its employees in conspicuous places on its docks and vessels, and maintain such notices for a period of at least sixty (60) consecutive days from the date of posting, stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs

1(a) and (b) of this Order; (2) that the respondent will take the affirmative action set forth in paragraphs 2(a) and (b) of this Order; and (3) that the respondent's employees are free to become or remain members of National Maritime Union of America, Port Arthur Branch, and that the respondent will not discriminate against any employee because of his membership in or activity in behalf of said organization;

(d) Notify the Regional Director for the Sixteenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply therewith."

XIII. That the Board's aforesaid decision and order are erroneous in fact, unauthorized and insufficient in law, and ought to be reviewed and set aside by this Court for the following reasons:

(1) The said decision and order of July 18, 1942, and the findings of fact and conclusions of law of the Board upon which the said decision and order are based, are not in accordance with law, are contrary to the evidence, are without evidence to support them, and are not supported or warranted by substantial or credible evidence;

(2) In its said decision and order the Board has failed to give due consideration to the opinion of this Court handed down on May 23, 1941,

and to the maritime safety legislation discussed and adverted to in said opinion.

(3) The acts of petitioner as shown by the testimony and evidence do not constitute a violation of the National Labor Relations Act;

(4) The Board erred in finding and concluding that your petitioner, by anti-union statements and in other ways, interfered with, restrained and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(1) and 8(3) of the Act;

(5) The Board erred in finding and concluding that your petitioner warned its employees against organization, threatened to discharge Union members and questioned an employee about membership in the Union and thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the said Act;

(6) The Board erred in finding and concluding that your petitioner discharged J. Gordon Rosen from the S. S. Nevada because of Union activities;

(7) The Board erred in finding and concluding that your petitioner discharged J. Gordon Rosen from the S. S. Washington because of Union activities;

(8) The Board erred in directing petitioner to cease and desist and to take affirmative action

as specified in the Board's aforesaid decision and order and to post notices to such effect.

Wherefore, your petitioner prays this Honorable Court to review and set aside the decision and order of the National Labor Relations Board herein referred to, and to grant petitioner such other and further relief as to the Court may seem just and proper.

Dated: August 28, 1942.

THE TEXAS COMPANY
By JAMES TANHAM
Vice President.
ALBERT E. VAN DUSEN,
135 East 42nd Street,
New York City, N. Y.
J. A. McNAIR,
929 So. Broadway,
Los Angeles, California
Attorneys for Petitioner,
The Texas Company.

State of New York,
County of New York—ss.

James Tanham, being duly sworn, deposes and says: That he is an officer, to wit, Vice President, of The Texas Company, the petitioner named in the foregoing petition; that he has read the foregoing petition by him subscribed as such officer and knows the contents thereof; that the same is true to the knowledge of deponent except as to the mat-

ters therein related to be alleged on information and belief, and as to those matters he believes it to be true.

JAMES TANHAM

Subscribed and sworn to before me this 28th day of August, 1942.

[Seal] SUSAN B. GIFFORD

Notary Public, Kings County. Clerk's No. 669, Register's No. 3263. N. Y. Co. Clerk's No. 605, Reg. No. 3G374.

My Commission expires March 30, 1943.

[Endorsed]: Filed Sep. 1, 1942.

[Title of Circuit Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD AND REQUEST FOR ENFORCEMENT

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, hereinafter called the Board, and pursuant to the National Labor Relations Act (49 Stat. 449, c. 372, 29 U.S.C., Sec. 151, et seq.), hereinafter called the Act, files this answer and request for enforcement of the Board's order.

1. The Board admits the allegations contained in paragraph 1 of the petition for review.

2. Answering the allegations contained in paragraphs II to XII, inclusive, of the petition for review, the Board prays reference to the certified transcript of the record, filed herein, of the proceedings heretofore had herein, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law, and order of the Board, and all other proceedings had in this matter.

3. The Board denies each and every allegation contained in paragraph XIII of the petition for review, and in the sub-sections thereunder, numbered (1) to (8), inclusive.

4. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board, were and are in all respects valid and proper under the Act.

Wherefore, having answered each and every allegation contained in the petition to review, the Board respectfully prays this Honorable Court that said petition be denied insofar as it prays that the order of the Board be set aside.

Further Answering, the Board, pursuant to Section 10 (e) and (f) of the Act, respectfully requests this Honorable Court for enforcement of its order issued against petitioner on July 18, 1942, in proceedings designated on the records of the Board as Case No. C-1276, entitled, "In the Matter of the Texas Company, Marine Division and National Maritime Union, Port Arthur Branch."

In support of this request for enforcement of its order, the Board respectfully shows:

(a) Petitioner, a Delaware Corporation, is engaged in business within this Judicial Circuit. This Court has jurisdiction of the petition to review herein and of this request for enforcement by virtue of Section 10 (e) and (f) of the Act.

(b) Upon proceedings had in said matter, as more fully shown by the entire record thereof, certified by the Board and filed with this Court herein, to which reference is hereby made, and including, without limitation, a complaint, answer, hearing for the purpose of taking testimony and receiving other evidence, Trial Examiner's report and exceptions filed thereto, written and oral argument had thereon, Decision and Order of the Board dated January 24, 1940; Opinion and Decree of this Court, entered on May 23, 1941, in proceedings for review and enforcement of said order of the Board, said proceedings being designated on the records of this Court as Case No. 9518, entitled The Texas Company v. National Labor Relations Board; Order of the Board, dated June 28, 1941, vacating and setting aside in pertinent part said Decision and Order of the Board, dated January 24, 1940; and written and oral reargument before the Board, the Board, on July 18, 1942, made its decision, duly stating its findings of fact and conclusions of law, and issued the following order, directed to petitioner, its officers, agents, successors, and assigns:

ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, The Texas Company, Marine Division, New York City and Houston, Texas, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in National Maritime Union of America, Port Arthur Branch, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment, or any terms or conditions of their employment, because of membership or activity in any such labor organization;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed by Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to J. Gordon Rosen immediate and full reinstatement to the position held by him on July 14, 1938, or to a substantially equivalent position, without prejudice to his seniority or other rights and privileges;

(b) Make whole J. Gordon Rosen for any loss of pay he may have suffered by reason of the respondent's discrimination in regard to his hire and tenure of employment by payment to him of a sum of money equal to the amount which he normally would have earned as wages, —including the reasonable value of his maintenance on board ship,—From April 19, 1938, to June 1, 1938, and from July 14, 1938 to the date of the respondent's offer of reinstatement, less his net earnings during such periods;

(c) Immediately post notices to its employees in conspicuous places on its docks and vessels, and maintain such notices for a period of at least sixty (60) consecutive days from the date of posting, stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1(a) and (b) of this Order; (2) that the respondent will take the affirmative action set forth in paragraphs 2(a) and (b) of this Order; and (3) that the respondent's employees are free to become or remain members of National Maritime Union of America, Port Arthur Branch, and that the respondent will not discriminate against any employee because

of his membership in or activity in behalf of said organization:

(d) Notify the Regional Director for the Sixteenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply therewith.

(c) On July 18, 1942, the Board's decision and order was duly served upon petitioner and all other parties.

(d) Pursuant to Section 10(e) and (f) of the Act, the Board has certified and filed with this Court a transcript of the entire record in the proceeding.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this answer and request for enforcement, and of the filing of the certified transcript of the entire record in said proceeding, to be served upon petitioner, and that this Court take jurisdiction of the proceedings and of the questions to be determined therein, and make and enter upon the pleadings, evidence, and proceedings set forth in the entire record of said proceeding, and upon the order made thereon, a decree denying the petition to review and set aside, and enforcing the whole, said order of the Board, issued on July 18, 1942, and requiring petitioner and its officers, agents, successors, and assigns to comply therewith.

Dated at Washington, D. C., this 8th day of October, 1942.

NATIONAL LABOR RELATIONS BOARD
By ERNEST A. GROSS
Acting General Counsel

District of Columbia—ss.

Ernest A. Gross, being first duly sworn, states that he is Acting General Counsel of the National Labor Relations Board, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing answer and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information, and belief.

ERNEST A. GROSS
Acting General Counsel

Subscribed and sworn to before me this 8th day of October, 1942.

[Seal] JOSEPH W. KULKIS
Notary Public, District of Columbia.

My Commission Expires April 15, 1947.

[Endorsed]: Filed Oct. 12, 1942.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION PROVIDING FOR CONTENTS OF RECORD

Subject to this Court's Approval, It Is Hereby Stipulated and Agreed by and between the attorneys for the above-named parties that the record in the above cause shall consist of the record heretofore filed in cause No. 9518, and the supplemental proceedings entered into by the National Labor Relations Board pursuant to the remand contained in this Court's opinion of May 23, 1941, in cause No. 9518.

Dated at New York, New York, this 8th day of October, 1942.

ALBERT S. VAN DUSEN
Attorney for Petitioner

Dated at Washington, D. C., this 2nd day of October, 1942.

ERNEST A. GROSS
Acting General Counsel,
National Labor Relations Board

Approved:

FRANCIS A. GARRECHT
Judge, United States Circuit Court of Appeals for the Ninth Circuit

[Endorsed]: Filed Oct. 14, 1942.